

OPINION OF ADVOCATE GENERAL
COSMAS

delivered on 15 June 1995 *

1. This is certainly not the first time that the Court of Justice has been called upon to interpret provisions under the additional milk levy system. However, despite the wealth of case-law on the subject, the Court has not often had occasion to deal with the interpretation of the provisions governing in particular the payment of the additional levy on quantities of milk sold for direct consumption. The questions referred to the Court by the Finanzgericht München for a preliminary ruling concern precisely those provisions.

I — The regulatory framework

2. Article 5c of Council Regulation (EEC) No 804/68 of 27 June 1968,¹ which was inserted by Article 1 of Council Regulation (EEC) No 856/84 of 31 March 1984,² introduced, for the purpose of curbing the increase in milk production, an additional levy payable on quantities of milk or other milk products which were either delivered to the purchaser for treatment or processing or

sold for direct consumption and exceeded a certain reference quantity.

3. As regards payment of the levy on quantities delivered to the purchaser for treatment or processing, the system was put into operation in the Member States on the basis of one of two alternative formulas provided for in Article 5c(1). Under Formula A, the levy is payable by *producers* of milk or other milk products on the quantities of milk delivered to purchasers and which, for the 12 months concerned, exceed a certain reference quantity. Under Formula B, the levy is payable by *purchasers* of milk or other milk products on the quantities of milk delivered to them by producers which exceed a certain reference quantity; under the second formula, the levy payable by the purchaser is passed on to those producers who have contributed to exceeding the purchaser's reference quantity.

4. In Article 5c(2) it was, moreover, laid down that the levy should also be payable by every milk producer on the quantities of milk and/or milk equivalent 'he has sold for direct consumption' and which, during the 12 months concerned, exceed a certain reference quantity.

* Original language: Greek.

1 — Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products (OJ, English Special Edition 1968 (I), p. 176).

2 — Council Regulation (EEC) No 856/84 of 31 March 1984 amending Regulation (EEC) No 804/68 on the common organization of the market in milk and milk products (OJ 1984 L 90, p. 10).

5. Special measures in respect of the additional levy on quantities of milk sold for direct consumption were introduced by Council Regulation (EEC) No 857/84 of 31 March 1984,³ which laid down in Article 6(1) that each producer of milk and milk products was to be assigned a reference quantity corresponding, in principle, to the sales for direct consumption made by the producer during the 1981 calendar year, increased by 1%,⁴ and in Article 6(2) that the total of the said reference quantities might not exceed certain quantities fixed at a different level for each Member State in the annex to the regulation. Moreover, Article 12(h) of the same regulation set out the following definition: that 'milk or milk equivalent sold directly to consumption: milk or milk products processed into milk equivalent, sold without going through an undertaking treating or processing milk'.

6. Further details concerning the application of the additional levy system were laid down in Commission Regulation (EEC) No 1371/84 of 16 May 1984,⁵ the provisions of which, having been repeatedly amended in the meantime, were codified by Commission Regulation (EEC) No 1546/88 of 3 June 1988.⁶ Article 4(1) of Regulation No

1371/84 (Article 5(1) of the codifying Regulation No 1546/88), provided that producers of milk or milk products selling milk and/or milk products for direct consumption were to send to the competent authority designated by the Member State 'an application for registration' accompanied by a statement listing the products and quantities of those products sold by direct sale during the reference calendar year. The 'application for registration' was, under that same provision, to be submitted before a date fixed by the Member State which was not, however, to be later than 31 December 1984.⁷ Article 4(2) introduced special measures with regard to the content of the statement accompanying the application for registration of producers who began selling for direct consumption after 1 January 1981 or who greatly altered their operations after that date, whereas Article 4(4) laid down the method of calculating the reference quantities assigned to producers who submitted the said 'application for registration'.

7. The additional levy on milk was originally imposed for five 12-month periods (the first starting from 1 April 1984), which ultimately increased to nine.⁸ In Article 1(3) of Council

3 — Council Regulation (EEC) No 857/84 of 31 March 1984 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector (OJ 1984 L 90, p. 13)

4 — Article 6 of Regulation No 857/84 was subsequently replaced by Article 1(2) of Council Regulation (EEC) No 590/85 of 26 February 1985 (OJ 1985 L 68, p. 1). In its new form Article 6(1) laid down that the Member States could provide that the producer's reference quantity was equal to the quantity of direct sales which he had made during the 1982 or 1983 calendar year, weighted by a certain percentage.

5 — Commission Regulation (EEC) No 1371/84 of 16 May 1984 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68 (OJ 1984 L 132, p. 11).

6 — Commission Regulation (EEC) No 1546/88 of 3 June 1988 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68 (OJ 1988 L 139, p. 12).

7 — Article 4(1) of Regulation No 1371/84, as it originally applied, provided that the date fixed by the Member States could not be later than 1 September 1984. The final date which the Member States could fix was subsequently 30 November 1984 (Article 1(1), first indent, of Commission Regulation (EEC) No 1955/84 of 9 July 1984 (OJ 1984 L 182, p. 10)) and, lastly, 31 December 1984 (Article 1 of Commission Regulation (EEC) No 3372/84 of 30 November 1984 (OJ 1984 L 313, p. 47)).

8 — See Article 1(1) of Council Regulation (EEC) No 816/92 of 31 March 1992 (OJ 1992 L 86 p. 83).

Regulation (EEC) No 2071/92 of 30 June 1992,⁹ which applied from 1 April 1993, Article 5c of Regulation No 804/68 was replaced by a provision stating simply that the price system of Regulation No 804/68 'is established without prejudice to the implementation of the additional levy'. That system has been governed since 1 April 1993, for seven 12-month periods, by the provisions of Council Regulation (EEC) No 3950/92 of 28 December 1992.¹⁰ That recent regulation lays down in Article 1 that the additional levy is to be imposed on quantities of milk or milk equivalent delivered to a purchaser or sold directly for consumption in excess of the corresponding reference quantities, in Article 2(1) that the levy payable on all quantities of milk or milk equivalent marketed during the 12-month period in question in excess of the total of the individual reference quantities of the same kind is to be shared between the producers who contributed to the overrun and, finally, in Article 4(1), that the individual reference quantities are to be equal in principle to the reference quantities available on 31 March 1993 (the date on which the first nine twelve-month periods applying the additional levy system ended).

II — Main proceedings — Questions referred for a preliminary ruling

8. The Dominikanerinnen-Kloster (Dominican Convent) Altenhohenau runs an agricul-

tural holding producing milk, butter and meat. Until the end of the school year 1991/92 it also ran a private elementary school with boarding facilities providing for approximately 120 to 135 pupils, together with those who worked in the school, the boarding facilities and the convent. After the introduction of the additional levy system on milk, a reference quantity of 68 262 kg was allocated to the convent for deliveries of milk to purchasers for processing or treatment.

9. On 2 December 1991 the convent applied to the Hauptzollamt Rosenheim (the 'Hauptzollamt') for the grant of a reference quantity for sales of milk to direct consumption, claiming that:

(a) the milk and butter requirements of the boarding school were met by the production of its agricultural holding;

(b) the price of the milk was included in the fees paid by the boarders for the services supplied in the boarding school;

(c) at the end of the school year 1991/92 the convent was compelled, by staff short-

⁹ — OJ 1992 L 215, p. 64.

¹⁰ — Council Regulation (EEC) No 3950/92 of 28 December 1992 establishing an additional levy in the milk and milk products sector (OJ 1992 L 405, p. 1).

ages, to cease operating the school and boarding facilities, with the result that its agricultural holding (which had been expanded by the purchase of land in 1989 and a development plan completed in 1991) acquired absolutely vital significance as a source of revenues.

If so:

10. By a decision of 16 January 1992 the Hauptzollamt rejected the convent's application, relying on the fact, according to the order for reference, that it had been submitted after the expiry of the time-limit provided for the submission of an 'application for registration' by producers who sold milk for direct consumption.¹¹ The convent appealed against that decision to the Finanzgericht München, which considered it necessary, before the case could be resolved, to refer the following questions to the Court for a preliminary ruling:

2. Is Article 4(1) of Commission Regulation No 1371/84 of 16 May 1984 valid, in so far as it restricts to 1984 the time-limit for registration of reference quantities for direct sale and takes no account of changes in marketing requirements, related to operating conditions, occurring after expiry of the time-limit?
3. Can a milk producer nevertheless be allocated a reference quantity for direct sale in the event of non-compliance with the time-limit referred to in Article 4(1),¹² by way of restoration to the *status quo ante* or on the basis of other general principles of Community law, having regard to the consideration that in accordance with their practice the administrative authorities would have rejected an application submitted in due time?

1. Is Article 12(h) (direct sale) of Regulation No 857/84 to be interpreted as also covering milk deliveries from an agricultural holding to a boarding establishment both belonging to the same institution, if the milk is passed on to the boarders against payment?

III — First question

11. The relevant provision, Article 12(h) of Regulation No 857/84, defines as 'milk or

¹¹ — It should be noted, however, that the representative of the Hauptzollamt referred, at the hearing before the Court, to the fact that the convent's application was rejected because the supply of milk to the boarding school was regarded as 'own consumption' and failure to observe the time-limit was 'only a secondary factor' in the decision.

¹² — Note concerning the Greek translation only.

milk equivalent sold directly to consumption' milk (or milk products processed into milk equivalent) which is sold *without going through an undertaking treating or processing milk*. Moreover, from the information given in the order for reference, it appears quite clear that the convent, the appellant in the main proceedings, supplied its pupils boarding at the school with quantities of milk for consumption without the milk going through an undertaking for treating or processing milk. Consequently, it is apparent that the national court wishes to ascertain whether the supply of milk for consumption in the above circumstances may be regarded as a sale.

12. I consider, and agree on this point with the Commission, that in order to deal with that question account must first and foremost be taken of the purpose of establishing the additional levy system. As the Court has repeatedly stated,¹³ the purpose of imposing the additional levy is to re-establish equilibrium in the milk market, which is characterized by structural surpluses, by limiting milk production. In order to achieve that objective, which, as the Court has held,¹⁴ complies with Article 39 of the Treaty, the Community legislature chose as a means of discouraging the production of

milk the obligation to pay the levy when a quantity of milk has been exceeded (reference quantity) representing the quantity which, in the relevant reference year, had either been supplied (Formula A) or purchased (Formula B) for processing or treatment or had been sold direct for consumption.

13. In those circumstances, and since the relevant measures do not make any distinctions, furtherance of the purpose of the additional levy system to the fullest possible extent requires the broadest possible interpretation of the phrase 'milk ... sold directly to consumption' so as to cover every form of transfer to a third party against payment¹⁵ of a quantity of milk for the purpose of its consumption without undergoing treatment or processing. If those conditions are met, other factors in respect of the conditions under which the transfer takes place should be regarded as immaterial in arriving at a definition. Thus neither the fact that the transfer of the milk does not take place on the basis of independent contracts but on the basis of a contractual relationship, under which the producer is obliged to supply to the other party, besides a certain quantity of milk, products or services of another kind, nor, of

13 — See, for example, the judgments in Cases 84/87 *Erpelding* [1988] ECR 2647, at paragraph 26, C-290/91 *Peter* [1993] ECR I-2981, at paragraph 13, and C-351/92 *Graff* [1994] ECR I-3361, at paragraph 26.

14 — See Case 84/87 *Erpelding* cited above, at paragraph 26.

15 — Payment is required, in my opinion, by the use of the term 'sale'. It should, however, be noted that Regulation (EEC) No 3950/92, which has governed the additional levy system since 1 April 1993, lays down in an even broader manner the definition 'milk or milk equivalent sold directly for consumption', subjecting expressly to that definition (see Article 9(h) of the said regulation) milk or milk products which are sold or transferred free without going through an undertaking treating or processing milk or other milk products.

course, the place where the milk is consumed can make any difference.¹⁶

14. The national court does not seem to have any doubts that 'sold for direct consumption' within the meaning of Article 5c(2) of Regulation No 804/68 and Article 12(h) of Regulation No 857/84 also covers disposal of milk under the conditions described in the order for reference, the supply, in other words, to the pupils of the private school run by the convent who board in the boarding school run by the convent, of quantities of milk from its agricultural holding, against payment which is included in the total amount paid by the pupils for the services provided in the boarding school.¹⁷ It mentions, however, that the Hauptzollamt

claimed at the hearing that, contrary to the Commission's view, the supply of milk for consumption in the circumstances set out constitutes 'own consumption', since on the one hand the boarders 'consume their own production' and on the other hand the convent cannot be regarded as a producer selling for direct consumption since its production is disposed of on the spot.

15. As the national court correctly points out, the view ascribed to the Commission¹⁸ can find no support in the provisions at issue here. It is of course self-evident that the consumption of milk by the producer himself does not constitute milk 'sold direct for consumption', whereas, on the other hand (see above at point 13 and footnote 15), disposal of milk for consumption to third parties (for example to those working on the producer's agricultural holding) without a price being paid does not constitute a 'sale' within the meaning of the provisions governing the additional levy system at the relevant time. I do not, however, see how it would be possi-

16 — Commission Regulation (EEC) No 536/93 of 9 March 1993 laying down detailed rules on the application of the additional levy on milk and milk products (OJ 1993 L 57, p. 12), as it applies from 1 April 1993 by virtue of Regulation No 3950/92, lays down in Article 1(1) that within the meaning of Article 2(1) of Regulation No 3950/92 quantities of milk or milk equivalent marketed in a Member State, which fall as such under the additional milk levy system, means 'all quantities of milk or milk equivalent which leave any holding in the territory of that Member State' (emphasis added). That provision, which is subsequent to the point in time at which the dispute before the national court arose, cannot affect the interpretation of the provisions in question (see the judgment in Case C-151/93 *Voogd Vleesimport en-export* [1994] ECR I-4915, at paragraph 15, and Case C-304/92 *Lloyd-Textil* [1993] ECR I-7007, at paragraph 17. However, despite that, the above provision has, I believe, simply the meaning that quantities of milk which do not leave the relevant holding (which Article 9(d) of Regulation No 3950/92 defines as all production units operated by the single producer) are not regarded as marketed and, accordingly, do not fall under the additional levy system. It cannot accordingly be interpreted in such a way that a quantity of milk which left the holding of the producer and was sold for consumption without going through an undertaking treating or processing milk or other milk products does not fall under the additional levy system for the sole reason that there is a connection between the place where the holding is situated and the place (for instance the boarding school, restaurant or hotel which might belong to the producer) where that quantity is marketed for consumption.

17 — It should be borne in mind that the question before the Court does not raise an issue of interpretation of Article 12(h) of Regulation No 857/84 in relation to the quantities of milk supplied to those working in the convent, in the school and the boarding school, but solely in relation to the quantities supplied to the boarding pupils.

18 — In its observations to the Court, the Commission denied that it had ever maintained that specific view. It concludes, however, that the order for reference is referring to the following situation, which occurred in 1986: the competent Commission service had expressed the view, following submission of a question to that effect, that quantities of milk supplied to sick persons hospitalized in a convalescent home for nervous diseases who take part in productive activities for therapeutic reasons do not fall under the additional levy system because, in those circumstances, there is a situation of 'own consumption'. According to the Commission, the factor that distinguishes the supply of milk to the said sick persons from the supply of milk to the pupils boarding at the convent's school is the fact that the latter are completely outside the milk production process. I do not share the Commission's view: in my opinion the milk quantities supplied to the sick persons in the conditions described should be regarded as not subject to the additional levy system only if the producer (or, under Article 12(c) of Regulation No 857/84, the occupier of the holding from which the milk originates) did not obtain payment for those quantities.

ble to accept that the boarders at the convent's boarding school consume 'their own production' on the sole ground that the milk supplied to them (against payment, I would point out) came from the convent's agricultural holding. I have, moreover, already mentioned (see above, point 13 at footnote 16) that the place where the milk sold is disposed of does not, in my view, have any effect on the definition of the term 'sold for direct consumption'.

16. In summary, I would suggest the following answer to the first question: 'Delivery against payment to persons at a boarding school of milk or milk products from a holding of an institution which is also responsible for the operation of the boarding school constitutes "milk or milk equivalent sold directly to consumption" within the meaning of Article 12(h) of Council Regulation (EEC) No 857/84.'

IV — Second question

17. In the order of reference it is stated that the doubts entertained by the national court

with regard to the validity of Article 4(1) of Regulation No 1371/84 (Article 5(1) of the codifying Regulation No 1546/88) arise from the fact that that provision, by which a mandatory time-limit was laid down within which producers selling milk for direct consumption were bound, in order to be awarded the relevant reference quantities, to submit an 'application for registration' accompanied by a statement listing the products and quantities of those products sold by direct sale during the reference year, does not provide for any exception to that obligation, in particular with regard to producers whose business situation has changed after the time-limit has expired in such a way that there is a need for a reference quantity to be awarded if the undertakings are to remain viable. The national court does not explain the principle on the basis of which it would be possible, in its view, to found an obligation on the part of the Community legislature to provide for the above exception. I consider, however, that in order to give a useful reply to the second question referred to the Court for a preliminary ruling, the provision at issue must be examined in the light of the principle of proportionality, that is to say the objective sought should be identified and an assessment made as to whether the measures introduced are appropriate and necessary to achieve that objective.¹⁹

18. At the outset I must point out that Article 4(1) of Regulation No 1371/84 does not

19 — For review, in the light of the principle of proportionality, of the validity of provisions which lay down a mandatory time-limit and provide for the consequences of exceeding that time-limit or impose penalties in that connection, see *inter alia* the judgments in Case C-339/92 *ADM Ölmühlen* [1993] ECR I-6473, at paragraph 15 et seq; Case C-155/89 *Philipp Brothers* [1990] ECR I-3265, at paragraph 33 et seq.; Case 357/88 *Hopermann* [1990] ECR I-1669, at paragraph 13 et seq.; Case 266/84 *Denkavit France* [1986] ECR 149, at paragraph 17 et seq.

expressly state that, as a consequence of the possible belated submission of the 'application for registration' therein provided for, the producer's entitlement to claim a reference quantity for sales of milk direct to the consumer should be forfeited. An examination of Article 4(1), however, in combination with Article 4(2) and (4)(a) and (b), from which it appears that the determination of the reference quantity for the sale of milk direct to the consumer takes place on the basis of evidence which the producers are obliged to submit together with the 'application for registration', does not, in my view leave room for any doubt as regards the fact that the award of such reference quantities is precluded if the 'application for registration' is submitted after expiry of the relevant time-limit.

19. In order to identify the objective of the measures at issue, I should point out first that the individual reference quantities, the exceeding of which gives rise to an obligation to pay the additional levy, correspond, in principle, in the case of sales of milk for direct consumption, to direct sales by the producer over the reference year, increased by a certain percentage (see Article 6(1) of Regulation No 857/84). It might, however, be necessary to correct the individual reference quantities which arise on the basis of the above facts, in order to comply with the basic principle of the system, according to which (see Article 6(2) of Regulation No

857/84), the total of the individual reference quantities may never exceed the *total quantities* fixed (at a level that is different for each Member State) in the annex to Regulation No 857/84. Precisely that possibility of correcting individual reference quantities on the basis of a uniform percentage was provided for in Article 4(4) of Regulation No 1371/84. In that light, the Community legislature evidently considered, on grounds of rational and effective management of the system, that there should be registration of producers selling for direct consumption and of the basic facts concerning that activity of theirs in order that their existing needs for the grant of the relevant reference quantities might be assessed in due time together with appropriate adjustment, in order that the total quantity provided for the Member State in question should not be exceeded.²⁰ In view of those factors, the setting of a time-limit within which producers in that category were obliged to submit the 'application for registration' in question, accompanied by a statement listing the products and quantities of those products sold by direct sale which took place for direct consumption in the period taken for the purposes of fixing the reference quantity and, furthermore, the provision that failure to observe that mandatory time-limit would entail forfeiture of the producers' entitlement to claim grant of a reference quantity constitute, in my opinion, measures which appear, in principle, appropriate and necessary for achieving the above objective.

20 — In view of that particular function of the time-limit for making an 'application for registration', the fixing of that time-limit should be regarded as a 'detailed rule' for the application of the additional levy system, covered by the power conferred by Article 5c(7) of Regulation No 804/68 on which, *inter alia* Commission Regulation No 1371/84 was based (see the judgments in Case C-118/89 *Lingenfelter* [1990] ECR I-2637, at paragraph 11, and Case 345/88 *Butterabsatz Osnabrück-Emsland* [1990] ECR I-159, at paragraph 9, as well as the judgment in *Hopermann* cited in the previous footnote, at paragraph 8.

20. Those measures cannot, in any case, be regarded as disproportionate to the objective sought for the sole reason that no possibility is provided of granting a reference quantity, after expiry of the time-limit, to producers such as those referred to in the second question. It is quite clear that to make provision for such a possibility under the additional levy system would be unthinkable except in the case of a producer who, before the system was introduced, had effected sales for direct consumption and was accordingly entitled to submit an 'application for registration' for the purpose of obtaining a corresponding reference quantity. The second question referred to the Court must, in consequence, refer only to producers who belong to that specific category; the facts of the case before the national court moreover indicate that that is the situation. However, neither the principle of proportionality nor any other general principle of Community law required the Community legislature to provide that a producer who had freely chosen not to exercise the above right within the prescribed period should be able to exercise it after its expiry, simply because, after that point in time, the conditions under which he carried out his activities had altered.²¹ That

is the case *a fortiori* where the recognition of such a right was likely to affect the interests of third parties: the grant, after the expiry of the time-limit, of reference quantities could in fact have led, in order that the hard and fast terms of the total quantity were complied with, to subsequent reduction of the reference quantities which had been granted to producers who, in the exercise of their entitlement, had submitted their 'application for registration' in time, had obtained a reference quantity and structured their activities accordingly.²²

21. I suggest, therefore, that the following reply to should be given to the second ques-

21 — The problem would take a different form if it concerned a claim to submit the 'application for registration' belatedly on grounds of *force majeure*. There is nothing in the order for reference to allow the inference to be drawn that such a claim was relied upon before the national court; it is, moreover, absolutely certain that in view of the way *force majeure* has been defined in the Court's case-law, in particular in the area of Community legislation governing the common agricultural policy ('abnormal and unforeseeable circumstances, outside the control of the trader concerned, the consequences of which, in spite of the exercise of all due care, could not have been avoided except at the cost of excessive sacrifice' — for which see, most recently, the judgment in Case C-136/93 *TransAfrica* [1994] ECR I-5757, at paragraph 14), it would not be possible to treat as a situation constituting *force majeure*, justifying the submission of the 'application for registration' after expiry of the relevant date, the fact that a change subsequent to that date in the business situation of the person concerned rendered it necessary for him to acquire a reference quantity which he would already have had if he had not freely chosen not to submit the application in question.

22 — It should be pointed out, however, that the Community legislature was not unaware of the problems that could arise for a producer who had taken the necessary steps to obtain the reference quantities he was entitled to but who was in difficulties because of subsequent alteration in the conditions under which he exercised his activity. Thus: (a) under Article 4(5) of Regulation No 1371/84 it was provided that producers who have obtained a reference quantity for direct sale for consumption and who cease direct sales totally or in part may, under certain conditions, obtain a reference quantity for deliveries to purchasers for treatment or processing; (b) under Article 4(6) of Regulation No 1371/84 (as amended by Article 1(1), second indent, of Commission Regulation (EEC) No 1955/84 of 9 July 1984 (OJ 1984 L 182, p. 10)), it was provided that producers who hold a reference quantity for deliveries to purchasers and who cease those deliveries totally or in part might (assuming, presumably, that the time-limit for submitting an 'application for registration' had expired) obtain a reference quantity for direct sale provided that such a quantity could be granted without exceeding the limit of the total quantity for that Member State; and (c) under Article 6a of Regulation No 857/84, added by Article 1(3) of Regulation No 590/85, it was provided that producers who had two reference quantities (one for deliveries to purchasers and one for direct sales) might, on request, obtain an increase in one of the reference quantities subject to a reduction of the other in order to enable them to adapt to changes in their marketing requirements.

tion: 'The validity of Article 4(1) of Commission Regulation (EEC) No 1371/84 of 16 May 1984 (Article 5(1) of Commission Regulation (EEC) No 1546/88 of 3 June 1988) laying down a time-limit expiring on 31 December 1984, failure to comply with which would lead to a producer forfeiting the right to apply for a reference quantity for sales of milk direct to consumption, is not affected by the fact that that provision does not provide for the possibility of the relevant application being submitted after expiry of the time-limit by a producer who had not, as he was entitled to, submitted an application, his marketing requirements having altered after expiry of the time-limit in such a way that the above reference quantity was now essential to him.'

V — Third question

22. By the third question the national court poses the question whether, despite the expiry of the time-limit laid down in Article 4(1) of Regulation No 1371/84, a reference quantity may be granted to a producer for direct sale to consumption 'by way of restoration to the *status quo ante* or on the basis of other general principles of Community law', if consideration is taken of the fact that, 'in accordance with their practice, the admin-

istrative authorities' would still have rejected an 'application for registration' submitted in due time?

23. As is made clear in the grounds of the order for reference, the question is raised because, according to the national court, even if the convent had lodged an 'application for registration' in due time, that application would nevertheless have been rejected in view of the fact that the competent national authorities were operating on the understanding that, in the view of the Commission,²³ the delivery of milk to the pupils in the boarding school did not constitute 'the sale of milk direct to consumption' within the meaning of the Community provisions in question.

24. I should right away point out that the objective fact alone that, in view of the administrative practice followed, there was a possibility or even certainty that the competent national authority would reject an 'application for registration' submitted in time, believing (wrongly, as I have argued above under point III) that the producer who delivered milk for consumption in the above circumstances had not effected sales direct to consumption in the relevant reference year, would not suffice to entitle the latter to submit an application after expiry of

23 — See, on that issue, points 14 and 15 above and footnote 18.

the time-limit. The above objective fact would not in fact prevent him from submitting an application within the time-limit and subsequently having recourse to the legal remedies provided against the decision rejecting his application in order to obtain a declaration from the competent judicial body (following, if need be, submission of a reference for a preliminary ruling to the Court of Justice) that the decision of rejection was unlawful.

25. The national court considers, however, that it might be possible, in the light of the actual facts of the case pending before it, to allow submission of an 'application for registration' despite expiry of the said time-limit (and perhaps also despite the time bar laid down in Paragraph 56(3) of the Finanzgerichtsordnung) in application of the 'principle of restoration to the *status quo ante*, which is also applicable in Community law'. The exact content of the principle invoked by the court of reference is not clear. I consider that what is meant is that the contested time-limit could possibly be waived in respect of the convent, since its failure to lodge an 'application for registration' in time was not due to the objective fact of the existence of an administrative practice which made it likely or certain that the application would be rejected but to the fact that, in view of that administrative practice, the convent *was con-*

vinced that it was useless to submit an application.

26. On that point it should be recalled that, in accordance with the case-law of the Court,²⁴ expiry of a time-limit cannot be pleaded against a person who was required to act within that time-limit if the situation was one of excusable error. Recently, moreover, the Court of Justice has accepted²⁵ that the concept of excusable error in relation to the point when the prescribed period within which an action may be brought begins to run concerns only exceptional circumstances in which, in particular, the conduct of the institution has been, either alone, or to a decisive extent, such as to give rise to a pardonable confusion in the mind of the party concerned. I consider that the concept of excusable error in the latter case constitutes merely a special application of the principle of protection of legitimate expectations:²⁶ where an individual, in order to obtain a full and accurate picture of the legal and factual aspects of a specific situation, has reasonably referred to the conduct of the competent bodies, he should not have to suffer the adverse consequences of administrative conduct which, rather than enlightening him, caused confusion. In view, however, of the foregoing, a construction by analogy of excusable error should be accepted with regard to the time-limits laid down by the Community legislature in respect of admin-

24 — Judgments in Case 25/68 *Schertzer v Parliament* [1977] ECR 1729, at paragraph 19; Case 117/78 *Orlandi v Commission* [1979] ECR 1613, at paragraphs 10 and 11; Case C-195/91 *P Bayer v Commission* [1994] ECR I-5619, at paragraphs 25 and 26. See also the judgment in Case 129/87 *Fingruth* [1988] ECR 6121, at paragraph 15.

25 — See the *Bayer* case cited in the above footnote, at paragraphs 25 and 26.

26 — See the judgment in *Fingruth*, cited in footnote 24, at paragraph 15.

istrative procedures, and in respect of situations in which the expiry of a time-limit is not linked to the conduct of a Community body, but to that of a national body, exercising the power conferred upon it by the Community legislature.²⁷

27. The question that now arises is whether the conviction engendered in the mind of a particular producer in view of the practice of the national competent authority in question that an 'application for registration', albeit submitted in time, would be rejected by the competent authority by reason of a mistaken interpretation and application of the substantive Community legislation could be regarded as excusable error sufficient to justify failure to comply with the time-limit prescribed by Article 4(1) of Regulation No 1371/84. That question should, in my opinion, be answered in the negative. Even if the principle were accepted that excusable error may relate not only to factors associated directly or indirectly with the commencement, length and expiry of the time-limit but also to the fate, from a substantive point of view, of the application which should have been submitted within that time-limit, I do not consider that a conviction engendered in the circumstances set out on the part of the producer constitutes *pardonable confusion*: I have already had the occasion to mention (see point 24 above) that there was nothing to prevent the producer, despite the existence

of a certain administrative practice, from submitting an 'application for registration' and seeking the appropriate judicial remedy once it had been rejected.

28. For the sake of completeness, I should, however, add that if it should be accepted that a conviction engendered in the above circumstances can, in principle, constitute 'pardonable confusion', it will be for the national court to assess when the confusion was due exclusively or to a determinant extent to the practice followed by the competent body. To that end it would be necessary to establish, for instance, the year when the administrative practice which led to the confusion first began,²⁸ the consistency with which it was followed and the extent to which it affected the outcome of applications submitted by producers who were in the same situation as the producer relying on excusable error.

29. In summary, I suggest that the following reply should be given to the third question referred to the Court: 'The fact that, in accordance with the administrative practice of the national authorities responsible for

27 — With regard to the question of how national authorities are bound by the general principles of Community law in the exercise of the powers conferred upon them by Community legislation, see *inter alia* the judgments in Cases 201/85 and 202/85 *Klensch and Others* [1986] ECR 3477, at paragraphs 8 and 9; Case 5/88 *Wachauf* [1989] ECR 2609, at paragraph 19; Cases 196/88, 197/88 and 198/88 *Cornée and Others* [1989] ECR 2309, at paragraph 14; Case C-16/89 *Spronk* [1990] ECR I-3185, at paragraphs 13, 17 and 28; and Case C-2/92 *Bostock* [1994] ECR I-955, at paragraph 16.

28 — The Commission pointed out in its observations to the Court that whereas the time-limit in question expired on 31 December 1984, the view taken by the Commission on which the Hauptzollamt apparently relied as founding the practice that it followed was formulated in 1986 (see also, on that point, the remarks in footnote 18).

applying the Community provisions in question, an “application for registration” submitted within the time-limit laid down by Article 4(1) of Commission Regulation (EEC) No 1371/84 of 16 May 1984 (Article 5(1) of Commission Regulation (EEC) No 1546/88 of 3 June 1988) would have been

rejected because of a misinterpretation and misapplication of the substantive Community provisions in question cannot justify, in application of the general principles of Community law, the submission of the said “application for registration” after expiry of the time-limit.’

VI — Conclusion

30. In view of the foregoing, I would propose that the Court answer the questions referred to it as follows:

- (1) Delivery, against payment, to persons at a boarding school of milk or milk products from a holding of an institution which is also responsible for the operation of the boarding school constitutes ‘milk or milk equivalent sold directly to consumption’ within the meaning of Article 12(h) of Council Regulation (EEC) No 857/84.
- (2) The validity of Article 4(1) of Commission Regulation (EEC) No 1371/84 of 16 May 1984 (Article 5(1) of Commission Regulation (EEC) No 1546/88 of 3 June 1988) laying down a time-limit expiring on 31 December 1984, failure to comply with which would lead to a producer forfeiting his right to apply for a reference quantity for sales of milk direct for consumption, is not affected by the fact that that provision does not provide for the possibility of the relevant application being submitted after expiry of the time-limit by a producer who had not, as he was entitled to, submitted an application, his marketing requirements having altered after expiry of the time-limit in such a way that the above reference quantity was now essential to him.
- (3) The fact that, in accordance with the administrative practice of the national authorities responsible for applying the Community provisions in question, an ‘application for registration’ submitted within the time-limit laid down by

Article 4(1) of Commission Regulation (EEC) No 1371/84 of 16 May 1984 (Article 5(1) of Commission Regulation (EEC) No 1546/88 of 3 June 1988) would have been rejected because of a misinterpretation and misapplication of the substantive Community provisions in question cannot justify, in application of the general principles of Community law, the submission of the said 'application for registration' after expiry of the time-limit.